

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

J.M.

Claimant,

vs.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency.

OAH No. 2011080681

**DECISION**

This matter was heard before Administrative Law Judge Dian M. Vorters, State of California, Office of Administrative Hearings on October 11, 2011, in Fresno, California.

Rickeisha Jones, J.M.'s mother represented J.M. (claimant).

Shelley Celaya, Client Appeals Specialist, represented Central Valley Regional Center (CVRC).

The record was closed and the matter was submitted on October 11, 2011.

**ISSUE**

Did CVRC appropriately determine that claimant is not eligible for intensive Applied Behavioral Analysis (ABA) services because he has not been diagnosed with autism, and that Behavior Intervention Services (BIS) are better suited to meet claimant's individual needs?

**FACTUAL FINDINGS**

1. Claimant is currently five years, three months of age (DOB: July 17, 2006). He is diagnosed with mental retardation and is eligible to receive services from CVRC on this basis. Claimant lives with his parents, Rickeisha J. and Angel M., and three siblings. Claimant's six year old brother and three year old sister are both diagnosed with autism. He

has an infant sister, born in or about June 2011, for whom no developmental or health information was provided.

2. In March 2009, claimant was assessed by Tim Jordan, M.D., a developmental pediatrician. Claimant was age two years, eight months at the time. The referral was made to address concerns about claimant's language skills. A letter prepared by Dr. Jordan detailing his consultation was submitted in evidence. At the time, claimant was receiving services from the Arizona Early Intervention Program. No medical concerns were noted and his physical examination and development was normal. In the consultation letter, Dr. Jordan described claimant as "very friendly and interactive and plays well with other children."

Dr. Jordan administered the Cat/Clams test of neurodevelopmental functions. The test measures the language and problem solving skills of children up to 36 months of age. Claimant passed the language section through 16 months of age and problem-solving section through 30 months of age. Non-verbal problem solving scored 75, whereas his verbal standard score was less than 50. Throughout testing, he was noted to pay very good attention, display good eye contact, and respond to requests including to approach the examiner. Dr. Jordan diagnosed claimant with a receptive language disorder. He ruled out a diagnosis of autism and recommended that he continue to receive state funded early intervention services.

#### *Individualized Education Programs*

3. Two Individualized Education Plans (IEPs) from claimant's school districts were submitted in evidence. An IEP from the Osborn School District in Arizona, dated May 12, 2010, was conducted when claimant was four years of age. He attended special education preschool four days per week as well as speech, language, and occupational therapy. The IEP report described claimant as "very aware of his environment" and "eager to please adults" seeking out interaction often during the day. He exhibited a short attention span and difficulty sitting/staying still. He would make loud outbursts when impatient. Attention seeking behavior tended to interfere with group activities such as music time and free play.

4. The Arizona IEP detailed claimant's then present level of academic achievement at age four. Claimant enjoyed having stories read to him and held books upright. He was able to trace letters in his name and use a variety of art mediums such as crayons, markers, and pencils. He was noted to enjoy painting and drawing. He could count up to ten with the class.

5. The Arizona IEP also summarized claimant's functional performance. He was described as "very helpful in the classroom." He assisted teachers in cleaning up or handing things out. He was attentive to other children when they were upset, and responded by giving them an item or a hug. Claimant threw tantrums when he did not get what he wanted or had to wait. His tantrums included crying, screaming, and throwing himself to the ground. His behavior was noted to "significantly and adversely impact the progress in the general

curriculum.” Claimant’s gross motor skills were typical for his age but he was receiving occupational therapy for fine motor delays. Claimant’s communication goals included improving his receptive language to facilitate classroom participation. He could respond when his name was called and use some sign language and gestures such as waving “hello” or “goodbye.” Claimant could engage in some interactive projects involving taking turns especially one-on-one. He had difficulty participating in group activities due to his short attention span.

6. The family moved to California in early 2011. Claimant’s annual IEP with the Fresno Unified School District is dated March 18, 2011. At age four years, eight months, he was found eligible for special education services on the bases of intellectual disability and speech or language impairment. No other basis for special education services, including autism, were indicated.

7. The Fresno IEP indicated that claimant was able to match ten colors, five shapes, all letters of the alphabet, and the numbers one to ten. He was inconsistently able to count to three with assistance. He could draw a horizontal/vertical line and circle, and trace his name. He was described as a “reluctant speaker” tending to use gestures, signs, and facial displays to relay his thoughts and ideas. He had difficulty articulating phonetic sounds for p, b, t, d, m, and n. Socially he appeared to enjoy school and liked to be near teachers. He was uncomfortable, would cry, and display a short attention span if placed at an independent station. Claimant displayed several adaptive living skills including self-feeding, self-toileting, drinking from a cup or straw, throwing trash away, helping with clean-up, and putting his backpack and coat in his cubby upon arrival at school.

### *Psychological Evaluation of Claimant*

8. To assess claimant’s eligibility for services, CVRC referred claimant to Lindsey Gerner, Ph.D., for a psychological evaluation. Dr. Gerner conducted the evaluation of claimant on May 3, 2011. As part of the evaluation, Dr. Gerner reviewed available records, interviewed claimant’s parents, observed claimant’s interactions, and administered tests designed to measure claimant’s cognitive and adaptive functioning. Dr. Gerner prepared a report of her evaluation which was submitted in evidence. She did not testify at hearing.

9. Dr. Gerner observed that claimant made eye contact upon meeting her. He had a “social smile” and “easily transitioned” from the waiting room to the testing room. He played with toys while his parents were interviewed, frequently looking over or calling attention to items he was playing with. He displayed difficulty playing on his own. He used gestures and pointing, with “very few words,” to communicate. His fine motor skills were delayed, as he used a fist grasp on pencils and preferred to scribble. Dr. Gerner observed minimal rocking during verbal tasks. Claimant’s reasoning and verbal skills were too limited for some of the subtests. As such, Dr. Gerner expressed that “results should be interpreted with some caution given the limited amount of test data that was obtained.”

10. Dr. Gerner administered to claimant the Wechsler Preschool and Primary Scale of Intelligence (WPPSI-III), Developmental Test of Visual Motor Integration, Adaptive Behavioral Assessment System (ABAS-II), and the Gilliam Autism Rating Scale-Second Edition. Her psychological evaluation report provided the following test results, in summary:

a. *WPPSI-III*. Claimant's overall cognitive skills could not be calculated due to limited test information. His Global Language score was the only composite score that could be calculated and fell within the "very low" range. His picture naming and pointing scores also fell within the "very low" range.

b. *Developmental Test of Visual Motor Integration*. Standard score of 70.

c. *ABAS-II*. Results of the ABAS were based on information reported by claimant's mother. Claimant's global composite score was 45 indicating that claimant's overall adaptive skills fall within the "extremely low range."

In the area of conceptual skills, it was reported that claimant will explore an unfamiliar room or new situation, look at an individual talking, name other people, and shake his head in response to questions. He can identify two numbers from a group of numbers. In the area of social skills, claimant was reportedly inconsistent in willingness to play with others as opposed to alone. He smiled when he saw his parents. He inconsistently hugged, kissed, and ran to greet others. It was noted that he did not say "thank you" when given a gift or show sympathy for others when they were upset. In the area of practical skills, claimant inconsistently recognized his home, helped to put toys away, slept through the night, brushed teeth, and used the bathroom unassisted. He sometimes dressed himself and buckled his own seat belt.

d. *Gilliam Autism Rating Scale – 2nd edition*. This is a standardized instrument to assess persons for autism and other severe behavioral disorders. Complainant's standard score was 83 which indicates a "possible" diagnosis of autism. A score of 85 or higher indicates a "very likely probability" of autism.

11. Because of concerns regarding possible autistic tendencies, Dr. Gerner applied claimant's behaviors and symptoms to the DSM-IV-TR Diagnostic Criteria for Autistic Disorder. In order to meet the diagnostic criteria of Autistic Disorder, a total of six criteria need to be met with two in social interaction, at least one in communication, and one in the activities and interest categories. Claimant met a total of three criteria (delay in spoken language, stereotyped and repetitive motor movements, and persistent preoccupation with parts of objects). Two questionable criteria were demonstrated (lack of social-emotional reciprocity and lack of varied, spontaneous, make-believe play or social imitation). It is noted that Dr. Gerner stated in her report under "Impressions" that there was only one "questionable item" which is inconsistent with her stated test summaries.

12. Dr. Gerner's diagnostic impression of claimant was as follows:

Axis I: 315.9	Mixed Receptive and Expressive Language Delays
Axis II: 317	Mild Mental Retardation
Axis III:	None

Dr. Gerner also stated that though some of claimant's behaviors might be considered "on spectrum," she believed that his presentation was more likely explained by intellectual deficits, and speech and language delays. She provided that her goal was not to conduct an "in-depth" assessment of claimant's mental health functioning.

13. Dr. Gerner recommended that claimant be reassessed in two to three years. Additionally, claimant should undergo a formal audiological evaluation to rule out hearing problems, receive speech and language interventions, and be enrolled in a highly structured special education classroom. Finally, his parents should implement behavior management techniques to help manage his difficult behaviors.

14. Carol Sharp, Ph.D., is a staff psychologist with CVRC. Her duties include serving on eligibility teams and providing staff consultation. She was not on claimant's eligibility team but reviewed his eligibility file prior to hearing. At hearing, she reiterated the findings made by Dr. Gerner in support of a diagnosis of mental retardation. She stated that under the Education Code, school districts use a much broader definition of autism as a basis for provision of services. The term "autistic-like" is an educational diagnosis which does not mean the child has "autism spectrum disorder." Regardless, neither of complainant's IEPs found support for an educational diagnosis of "autistic-like" disorder.

15. Dr. Sharp reviewed a letter dated September 27, 2011, written by claimant's special education teacher, Charlene Autry. Ms. Autry wrote that she had observed the following behaviors:

- It appears that [claimant] wets his pants on [sic] and does not let anybody know he needs to go
- He cries and screams when he is unable to get what he wants (toy, choice of center)
- He appears to be very attached to food and will get very upset if he is unable to have it
- He plays well with other students and does not hit them
- He likes to help the teacher out

In Dr. Sharp's opinion, some of the behaviors might be associated with autism, but playing well with other students, not hitting other students, and willingly helping the teacher are not associated with an autistic child. Dr. Sharp does not recommend that claimant receive intensive services designed for autistic children. She does recommend speech and language intervention.

16. Tamie Smith is a program manager at CVRC where she has worked since 2001. She testified that she is familiar with claimant's case but has had only brief contact with him at his residence. She is aware of his parents' concerns including self-injury, aggression toward others, tantrums, lack of safety awareness, and toileting. Claimant's parents believe he is autistic and seek Intensive ABA services to deal with his associated behaviors. Ms. Smith stated that CVRC offers two types of interventions for behavior modification:

- 1) Behavior Intervention Services (BIS) follows a non-intensive model of intervention for children with multiple disabilities and behaviors, including mental retardation, designed to address serious maladaptive behaviors. This program is not designed for children with autism.
- 2) Intensive Applied Behavioral Analysis (Intensive ABA) provides services specifically designed for children diagnosed with autism to help them "catch up to the level of their peers." ABA is tutor-based and designed to work directly with the child on a one-to-one basis with some parental supports.

17. CVRC adheres to a published Purchase of Service Policy (Policy) which was made available to claimant. The Policy is based on provisions in the Lanterman Act and provides the planning team with uniform guidelines on the provision of services to consumers with a variety of developmental disabilities. Under "Behavioral Service Standards," the policy sets forth the basis for provision of either ABA or BIS for clients who exhibit "aggression, self-injury, non-compliance, property destruction, eloping and many others." Welfare and Institutions Code section 4686.2 defines regional center requirements for ABA or BIS. BIS services may be in a one-on-one or group setting.

18. According to Ms. Smith, the planning team has offered BIS to claimant because he does not qualify for "intensive" tutor-based ABA services. BIS is a "non-intensive" or consultative model of intervention. BIS vendors or specialists work with the family to train the parents to modify the consumer's maladaptive behaviors. ABA analysis is included in BIS services but the delivery of the services is through the parents. If claimant's parents agreed, a plan would be developed to include techniques specific to claimant's individual needs. The goal of BIS is to help parents to identify triggers and ways to minimize challenging behaviors. Claimant's two siblings receive specialized autism services through the Center for Autism Related Disorders (CARD). This vendor provides services to the siblings in claimant's home. According to Ms. Smith, CVRC will not provide autism services to claimant simply because he is present at the home. The service must fit claimant's individual needs and convenience to the parents is not controlling.

19. Haig Derboghossian, Ph.D, is a clinical psychologist and the autism specialist at CVRC. He works with behavioral service vendors who provide both intensive and non-intensive services. In his opinion, BIS services are best for children like claimant who are not autistic, function well in school, and can communicate with teachers. BIS services can also be offered in the consumer's home. ABA services are not appropriate for claimant

because the goal of ABA is to help autistic children to reach the level of their peers. The goal of BIS is to address maladaptive functioning and cognitive deficits, including claimant's aggression, toileting, and other known issues. CVRC makes the determination as to whether the child needs intensive services (if an autistic disorder diagnosis is made) or BIS services. The vendor provides an assessment of the behaviors, creates a plan for the child, and provides the services.

### *Claimant's Witnesses*

20. Angel M. testified at hearing regarding his son's challenges. He stated that his biggest fear is "stranger-danger." He shared that claimant has opened the door and left the home or wandered off in public places like malls. Angel M. fears that claimant will be hit by a car or abducted. He relayed instances of aggression including claimant pushing, stepping on, and choking his six-year-old brother. Claimant has also pushed his three-year-old sister to the ground and attempted to sit on her with all of his weight. Angel M. feels that claimant's aggression is growing. Angel M. has attended training including a six-week course at CVRC on ABA. He has applied his learned techniques to redirect claimant but expressed that the results are "up and down."

21. Rickeisha J. testified at hearing regarding her son's challenges. She feels that claimant shows many similarities to his older brother who is diagnosed with autism. She has experience raising two children diagnosed with autism and in her opinion, claimant has autism spectrum disorder. Rickeisha J. noted that Dr. Gerner expressed that there is a "possibility" of autism in claimant's case based on his Gilliam Score of 83. Rickeisha J. has conducted a lot of research on the disorder and taken a course in ABA Intensive Training offered at CVRC. She has applied those principles at home to claimant. Due to the special needs of her children, there are eight therapists in her home each week. She stated that she generalizes the instruction given for her autistic children to claimant. She expressed frustration with the fact that she has three special needs children and an infant leaving no time to actively work a separate program for claimant.

22. Ricky Jefferies, Jr. is claimant's 29-year-old uncle. He wrote a letter in which he described claimant as a "very bright and happy little 5 yr old boy." However, he described concerning and harmful behaviors including claimant hitting himself in the head with objects, banging his head on the ground and wall, running away towards the street, sticking objects into electrical outlets, hitting his siblings, and pushing his older brother down the stairs. He expressed the family's serious safety concerns for claimant and his siblings.

## LEGAL CONCLUSIONS

### *Applicable Laws and Regulations*

1. The statutory scheme known as the Lanterman Developmental Disabilities Services Act (Lanterman Act) was enacted by the legislature to provide facilities and services to meet the needs of those with developmental disabilities. (Welf. & Inst. Code, §§ 4500-4846; *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1125.)

2. Regional centers are required to contract with appropriate agencies to provide fixed points of contact in the community for persons with developmental disabilities and their families, such that they have access to the services and supports best suited to them throughout their lifetime. (Welf. & Inst. Code, §§ 4620, 4648, subd. (a)(1).)

3. Determinations regarding which services and supports are necessary for each consumer shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan (IPP) participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (Welf. & Inst. Code, §§ 4512, 4646.)

### *Service Determination*

4. Claimant is eligible for CVRC services based on his diagnosis of mild mental retardation. (Welf. & Inst. Code, § 4512.) CVRC provided persuasive evidence that claimant does not have autism, autism spectrum disorder, or an autism-like educational diagnosis. Therefore, it properly determined that ABA Intensive services, which are designed specifically to aid autistic clients in reaching the level of their peers, are not appropriate for claimant's individual needs. Claimant qualifies for and will benefit from non-intensive BIS services.

5. Claimant did not show that he currently has autism or autism spectrum disorder. The evidence from Dr. Jordan, a developmental pediatrician, IEP reports from two states, a psychological evaluation from Dr. Gerner, and a letter from claimant's special education teacher do not support a finding of autism. It is recommended that claimant's challenging behaviors and speech/language deficits be addressed through BIS and educational supports.



## ORDER

The appeal of J.M. for Applied Behavioral Analysis services from Central Valley Regional Center, based on a diagnosis of autism, is DENIED. The Notice of Proposed Action denying eligibility is AFFIRMED.

DATED: October 21, 2011

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DIAN M. VORTERS  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

**This is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days after receiving notice of this final decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)**